

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matters of:

**FEATURE GROUP IP Petition for
Forbearance Pursuant to 47 U.S.C. § 160(c)
from Enforcement of 47 U.S.C. § 251(g),
Rule 51.701(a)(1), and Rule 69.5(b)**

WC Docket No. 07-256

**Petition of the EMBARQ LOCAL
OPERATING COMPANIES for Limited
Forbearance Under 47 U.S.C. § 160(c) from
Enforcement of Rule 69.5(a), 47 U.S.C.
§ 251(b), and Commission Order on the
ESP Exemption**

WC Docket No. 08-8

**REPLY COMMENTS OF GRANDE COMMUNICATIONS NETWORKS, INC.,
AND XO COMMUNICATIONS, LLC.**

Grande Communications Networks, Inc. (“Grande”) and XO Communications, LLC, (“XO”), by their attorneys, hereby submit replies to the comments filed in the above-referenced dockets in response to the Petitions for Forbearance filed by Feature Group IP (hereinafter, the “Feature Group IP Petition”) and the Embarq Local Operating Companies (hereinafter, the “Embarq Petition”) (collectively, the Feature Group IP Petition and the Embarq Petition will be referred to hereinafter as the “Petitions”) in the above captioned dockets.¹ As discussed herein and in the initial comments of numerous parties, the two Petitions should be dismissed as deficient and improper uses of the forbearance procedures in Section 10 of the Communications Act of 1934, as amended (the “Act”). 47 U.S.C. § 160. Moreover, as they have demonstrated at length in other Commission proceedings, Grande and XO underscore that the ESP access charge exemption, at issue in the two Petitions, currently applies to IP-PSTN

¹ These reply comments are filed pursuant to the deadlines set forth in FCC Public Notices DA 08-93 and DA 08-94, released January 14, 2008.

traffic, a position echoed by numerous commenters.² Any changes the FCC might make to the scope of the ESP access charge exemption as it applies to IP-PSTN traffic must be addressed in a rulemaking, such as the pending *IP-Enabled Services* (WC Docket No. 04-36) and *Intercarrier Compensation* (CC Docket No. 01-92) dockets – both of which have raised the issue of the future regulatory treatment of IP-PSTN voice traffic and in which full records have been generated.

Grande and XO join those parties that argue that Feature Group IP or Embarq, or both, are attempting to improperly use the forbearance process. An apparent central motive behind these Petitions may be somewhat understandable given the contentiousness currently surrounding the scope of the ESP access charge exemption, namely a desire to force the Commission to a rapid decision on the debates regarding the proper treatment of IP-PSTN traffic for intercarrier compensation purposes. However, the controversy is artificially created, at least with respect to traffic that has already been completed – certain incumbent local exchange carriers (“ILECs”) have been attempting to impose interstate access charges on IP-PSTN despite the current application of the ESP access charge exemption to such traffic. Despite the origins of the controversy, there can be no doubt that forbearance petitions filed under Section 10 are not a proper way to resolve it expeditiously or to clarify the current state of the law, to the extent that may be required.³ As discussed later in these reply comments, the Commission may only

² In these replies, Grande and XO use the term IP-PSTN traffic to include both IP-PSTN traffic and “incidental PSTN-PSTN traffic” as described in the Feature Group IP Petition, a term which Grande and XO believe is broad enough to include the type of traffic at issue in the Embarq Petition, if it is not the same.

³ See, e.g., Comments of Sprint Nextel at 2-3 (concurring that the abuse of forbearance procedures to get a rapid result should not be condoned); Comments of CommPartners at (2) (same).

address changes to the ESP access charge exemption in a rulemaking and, if it makes any changes, they should apply only *prospectively*.⁴

Both Petitions are simply procedurally defective, as several parties note, and should be dismissed on that basis. The Feature Group IP Petition, as Verizon and others observe, as a threshold matter, is essentially a petition for declaratory ruling to affirm the applicability of the ESP access charge exemption to IP-PSTN traffic.⁵ Feature Group IP seeks forbearance only in the event that the Commission declines to reaffirm the applicability of the exemption. Whether the Commission will do so is a matter under consideration in the pending *IP-Enabled* and *Intercarrier Compensation* proceedings. Only in the event the Commission makes a determination in those rulemakings that, *prospectively*, access charges will apply to IP-PSTN traffic would the consideration of a forbearance petition as styled by Feature Group IP be appropriate.⁶

⁴ As the post-merger AT&T has noted in recent proceedings concerning the application of access charges to IP-PSTN traffic, any Commission decision to apply access charges or other intercarrier compensation to IP-PSTN traffic should be prospective only. Comments of AT&T, WC Docket No. 05-283 (filed Dec. 12, 2005) at 2.

⁵ Comments of Verizon at 4. Moreover, while Unipoint urges the Commission to grant the Feature Group IP request for forbearance, it contends that the result of such a grant would be that the ESP access charge exemption *continues* to apply to IP-PSTN traffic. See Comments of Unipoint at 14-15. Such a “positive” outcome preserving the *status quo* would only underscore the procedural impropriety of the Feature Group IP request in the first place. See also Comments of Time Warner on the Feature Group IP Petition at 3 (Feature Group IP may not seek a decision that the ESP access charge exemption still applies in a forbearance petition).

⁶ In light of the position that Grande and XO take herein regarding the procedural deficiencies of the Feature Group IP Petition, they take no position at this time on the argument of NECA and others that, assuming *arguendo* the ESP access charge exemption does *not* apply to IP-PSTN traffic, Feature Group IP has no standing to seek forbearance from the application of the access charge rules to such traffic. See Comments of the National Exchange Carrier Association, Inc., *et al.*, on the Feature Group IP Petition at 6-7; Comments of USTelecom at 7. However, there can be no doubt, in that hypothetical case, that the Commission *sua sponte* could issue a forbearance decision under Section 10. (Where a party filed separate comments on the two Petitions, the citations herein will designate which set of comments are being referenced.)

Separate and apart from the foregoing flaw – or perhaps the other side of the same flaw – the Feature Group IP Petition, while acknowledging at the start that the exemption currently applies to the traffic at hand, nonetheless is premised on the applicability of the access charge rules and related law and regulations to IP-PSTN traffic. But, as Grande and XO discuss below, the plain fact is that the ESP access charge exemption *does* currently apply to this traffic. Accordingly, forbearance is *not* available as a procedural matter because Feature Group IP seeks forbearance from law and regulations that do *not* currently apply, something *not* contemplated by Section 10 of the Act.

The Embarq Petition is similarly defective, albeit for slightly different reasons. As an initial matter, the Embarq Petition is guilty of a logical absurdity: forbearance is appropriate with regard to a currently *applicable* statutory provision or regulation. By definition, it cannot be a mechanism for the Commission to forbear from enforcing a provision or regulation that does not currently apply.⁷ But that is exactly what the Embarq Petition seeks, because its position is that, *currently*, the ESP access charge exemption does not apply to IP-PSTN traffic.⁸ If true, forbearance is not available in such circumstances: Embarq cannot use the forbearance procedure simply to maintain the *status quo*.⁹

⁷ Google, for example, notes that Embarq improperly seeks to use forbearance to “add regulatory burdens upon [currently] unregulated non-carrier businesses.” Comments of Google at 9. *Accord* Comments of TEXALTEL at 5.

⁸ Grande and XO do not disagree with *either* Sprint Nextel that, in light of its position regarding the current inapplicability of the ESP access charge exemption to IP-PSTN traffic, Embarq should have sought a declaratory ruling, *or* with Google that Embarq, in essence, seeks enforcement of its access charge tariff against providers of VoIP. *See* Comments of Sprint Nextel at 6; Comments of Google at 3. TDS and NECA *et al.*, although supporting the Embarq Petition as its primary position, seems to acknowledge the precarious procedural posture by asking, in the alternative, that the Commission issue a declaratory ruling that the ESP access charge exemption does not apply to IP-PSTN traffic. Comments of TDS at 4-5; Comments of National Exchange Carrier Association *et al.* on the Embarq Petition, at 3.

⁹ Grande and XO submit that the suggestions of Century Tel, Inc. and Qwest that the Commission grant the Embarq Petition as a provisional measure pending the resolution of

In addition, the Embarq Petition must fail because the Act's provisions governing forbearance extend only to statutory provisions or regulations that apply to "telecommunications carriers" and "telecommunications services."¹⁰ Services subject to the ESP access charge exemption, by definition, are *not* telecommunications services, and the entities to which the exemption applies are *not* telecommunications carriers.¹¹ Accordingly, Section 10 is not available to forbear from the application of such a regulation.

Forbearance is not the available to change the current state of affairs either, which is the relief, ultimately, that one must assume Embarq seeks given the present application of the ESP access charge exemption to IP-PSTN traffic. In short, Embarq asks the Commission to undertake the tasks the agency set before itself in the *IP-Enabled* and *Intercarrier Compensation* rulemakings – determine a regulatory framework for the treatment of IP-PSTN traffic. A number of parties correctly observe that, the public interest, not to mention the law, demands that such efforts take place in a notice and comment rulemaking¹² where the ramifications of a new

the *Intercarrier Compensation* proceeding would be an abuse of the forbearance procedures. See Comments of CenturyTel at 2; Comments of Qwest at 17. This "solution" merely highlights the propriety of addressing the issues raised in the Petitions in the rulemaking framework – as the Commission has already undertaken to do – and that Embarq Petition, on its own terms, *merely seeks preservation of the alleged status quo*. Indeed, Embarq, in its Comments opposing the Feature Group IP Petition, urges adoption of its own Petition to "ensure the ESP exemption is not misapplied." Comments of Embarq at 32. At bottom, taking the Embarq Petition at face value, Embarq does not seek forbearance from anything.

¹⁰ 47 U.S.C. § 160.

¹¹ Accord Comments of Global Crossing at 4.

¹² Somewhat inadvertently, Verizon highlights a reason why the Embarq Petition should be denied. Embarq seeks, in effect, a rule change by asking the Commission to rule that the access charges rules will apply to IP-PSTN traffic. The *Core* and *Fones4All* decisions cited by Verizon and Time Warner stand for the proposition that the Commission's forbearance authority under Section 10 is not a vehicle to expand the application of regulations. See Comments of Verizon at 7-8 & n. 16; Comments of Time Warner *et al.* on the Embarq Petition at 7.

regulatory regime can be addressed in a comprehensive fashion.¹³ Because Embarq seeks the extension of the access charge regime to a new category of traffic, Commission precedent – the Commission’s *Core* and *Fones4All* decisions – precludes this from being accomplished through a forbearance petition under Section 10, as several parties explain.¹⁴ Indeed, as Time Warner notes, *assuming* that the Commission *could* forbear in a Section 10 proceeding from applying the ESP access charge exemption to IP-PSTN traffic, the result following forbearance would be that *no* compensation regulation would apply to such traffic at all absent adoption of a future regulation, *not* the automatic application of access charges, as Embarq seems to presume.¹⁵

For the foregoing reasons, the Commission cannot act on either Petition. In dismissing the Petitions, however, the Commission should reiterate the current application of the ESP access charge exemption to IP-PSTN traffic given the existing controversies. Grande and XO join those numerous parties that note that the ESP access charge exemption currently applies to IP-PSTN traffic.¹⁶ As both Grande and XO have explained to the Commission on previous

¹³ Several parties are incorrect in asserting that the ESP exemption applies only to ESP traffic in one particular circumstance, when an ESP obtains access to the local PSTN in order to allow customers of the ESP to obtain access to the ESP. *See* Comments of Verizon at 12; Comments of the Texas Statewide Telephone Cooperative, Inc. at 2; Comments of USTelecom at 2. *See also* Qwest at 11. Although this scenario may have been a common circumstance in which the exemption applied when it was first adopted by the Commission, interpreting the exemption so narrowly is inconsistent with its articulation as applying to all enhanced and information services and to both originating and terminating traffic. *Vonage v. Minnesota PUC*, 290 F. Supp. 2d 993, 999 (D. Minn.), *aff’d*, 394 F. 3d 568 (8th Cir. 2004) (VoIP-originated traffic that terminates on PSTN undergoes net protocol conversion and is enhanced under Section 64.702 of Commission’s rules); *Access Charge Reform*, 12 FCC Rcd 15982, 16131-16135 (1997) (exemption applies to originating and terminating traffic), *aff’d Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

¹⁴ Comments of Verizon at 12. Moreover, as USTelecom notes, “forbearance is a mechanism “to eliminate outdated regulations,” not a vehicle to adopt a new regulatory paradigm. Comments of USTelecom at 9 (footnotes omitted).

¹⁵ Comments of Time Warner *et al.* on the Embarq Petition at 6-7.

¹⁶ *See, e.g.,* Comments of Sprint Nextel at 2, 4-5; Comments of Google at 6-8; Comments of Unipoint at 5-6; Comments of Time Warner *et al.* on the Embarq Petition at 3, 5; Comments of Global Crossing at 5-8; Comments of TEXALTEL at 5. *Accord* Comments

occasions, the ESP access charge exemption applies to all enhanced or information services that access the local exchange network, whether on the originating or terminating end of the communication.¹⁷ As the Commission broadly noted when commencing the *Intercarrier Compensation* proceeding, “long distance calls handled by ISPs using IP telephony are generally exempt from access charges under the enhanced service provider (ESP) exemption.”¹⁸

In the final analysis, while the Commission may wish to reconsider the compensation mechanisms applicable to IP-PSTN traffic, it should do so in a comprehensive rulemaking framework *not through forbearance petitions*.¹⁹ This is probably the most recurrent theme in the opening comments, even among those that may favor, at least in part, the positions set forth in one of the Petitions.²⁰ Fortunately, the Commission has laid the groundwork for such

of the Open Internet Coalition at 23 (the Commission should “hold the line” and refuse to extend access charge to Internet-delivered voice). Although Verizon does not come out and expressly state that the ESP access charge exemption currently applies to IP-PSTN traffic, Verizon clearly notes that IP-PSTN traffic is different than traditional circuit switched traffic because of the capabilities that IP-PSTN traffic brings to end users. Grande and XO notes that the definition of “information service” in the Act is predicated on just such “capability,” and suggests that Verizon *sub silentio* appears to acknowledge that IP-PSTN traffic is information services traffic, which would make it subject to the exemption.

¹⁷ See Comments of NuVox Communications, XO Communications, and Xspedius Communications, Inc., WC Docket No. 05-283 (filed Jan. 11, 2006) at 4-8 Reply Comments of Grande Communications Networks, Inc., WC Docket No. 05-283 (filed Jan. 11, 2006) at 5-8. The arguments of XO and Grande contained in these pleadings regarding applicability of the ESP access charge exemption to IP-PSTN traffic under current law are incorporated herein by reference thereto.

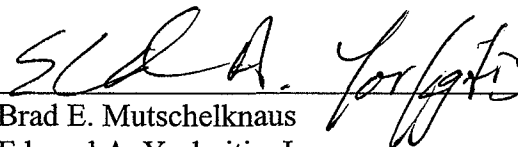
¹⁸ *Intercarrier Compensation*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 (2001).

¹⁹ As TEXALTEL observes, requests for forbearance are prone to abuse and have become “the alternative to notice and comment Commission rules and comprehensive proceedings . . .” Comments of TEXALTEL at 7.

²⁰ See, e.g., Comments of PAETEC, *generally*; Comments of Sprint Nextel at 3-4; Comments of Qwest at 19-21; Comments of the Texas Statewide Telephone Cooperative, Inc. at (2); Comments of Unipoint at 12-14; Comments of Global Crossing at 3-4; Comments of CommPartners at (3); Comments of TEXALTEL at 3.

action in its long-pending *IP-Enabled* and *Inter-carrier Compensation* proceedings. Grande and XO urge the Commission to dismiss expeditiously both of the Petitions as procedurally defective and to address possible changes to the regulatory treatment of IP-PSTN traffic on a *prospective* basis in either of these dockets.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brad E. Mutschelknaus", is written over a horizontal line.

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